September 2015 copy for October 2015

Robert Banks, a barrister, writes Banks on Sentence. It is the second-largest selling criminal practitioner's text book and is used by judges for sentencing more than any other. The book is classified by the Ministry of Justice as a core judicial text book. The 2015 edition of the book and app was published recently. The app is for Apple iPads and Windows 8/10 tablets and computers and costs £99 (incl. VAT). Updates will appear in the relevant paragraph. The print copy costs £106 and there will be regular updates on www.banksr.com. There is also a discount available when the print copy and app are purchased together. If you have access to a computer, you can follow Robert on twitter: @BanksonSentence and you can receive his weekly sentencing Alert.

Q I received 2½ years and the barrister never came to see me. I spoke to the solicitor and I was told there would be an appeal. I never spoke to the barrister. I then discovered the appeal was about the sentence and not about the conviction so I never had an appeal. Surely I am entitled to an appeal and be involved in it? I want my say. It is my appeal in any event.

A You say that the barrister did not come and see you after your sentence. The Court of Appeal in the Guide to Commencing Proceedings in the Court of Appeal 2008 para A1-1 says that legal representatives must see the defendant at the conclusion of the case. Sometimes advocates can't see defendants because they are being loaded into a van but it is an important rule that should be adhered to where possible.

You note that the barrister did not involve you in the appeal paperwork. It is normal for the barrister not to involve defendants in the details of the appeal points in the same way that advocates do not tell the defendant every question they intend to ask a witness. However, for the witnesses, advocates should discuss with the defendant the general areas that are to be questioned. The same is true about appeal documents. He should have told you his views and given you an opportunity to comment.

The real issue is, however, your appeal against conviction. After you were convicted you should have been seen by the barrister and told whether or not there was an appeal. If you are legally aided, the solicitors are also obliged to send you a letter at the conclusion of the case. The Legal Aid Agency Specialist Quality Mark Standard lays down at para F3 that the letter should include 'what happened in the case and what further action may be taken or may be necessary'. That would inevitably include information about your appeal.

You state you must have your say and input about the appeal. The same principles apply about your involvement with a conviction appeal as with a sentence appeal. You should have been able to discuss with your barrister the reasons why you think there should be an appeal. However, as the issues are primarily issues of law while you are represented, it is the barrister's judgement that determines what issues/grounds of appeal are taken. If you write your own grounds of appeal then you decide what is included. The problem with grounds of appeal written by defendants is that virtually every such appeal fails.

Here, the problem seems to be that the barrister did not inform you about the prospects of an appeal against conviction. Not only was he obliged to see you after you were convicted (which may or may not have happened), he was also obliged to tell you the prospects of a successful appeal and, if there were no grounds, he was obliged to set that out in writing so that you could see his reasons.

Q [This is part of a long letter.] I have been reading your column for some time and see all the cock-ups there are, but no one ever seems to get any blame. How can they claim it's because of low fees? Surely we are entitled to a proper service? Who is going to do something about it?

A You say no one ever gets the blame. Many Judges are reluctant to blame lawyers in case it damages the system. The problem is that this failure to confront the issues makes the problem

worse. Long ago, Richard Crossman, a Minister of Health, was presented with a damning report about abuse in mental hospitals. It made chilling reading. The civil service said it was so bad it would be devastating to their department if the report was published and the report must not be published. Richard Crossman said the public had a right to know. He gave a long press conference about it and the report received massive publicity and the universal reaction was total shock. The result was that the money was released to do something about the problems, massive changes were made and the reputations of Richard Crossman and his ministry were enhanced. The government and the public worked together to improve matters. Since then the default mode of the establishment is to cover problems up and so improvements are delayed or never materialise.

You mention the low fees. As I said last month, that cannot be an excuse but it is an explanation. Much of what a criminal barrister does is paid for at a rate less than the current minimum wage. Many advocates believe they cannot afford to buy the necessary books. It is not surprising that cock-ups occur. But the problem cannot only be about low fees. Let me tell you about JW. The court reference is 2015 EWCA Crim 599. Few will know about him because his court judgment was put in the 'restricted publication' list of cases. The establishment might say it was in the restricted list to protect the name of the victim involved. If that was a cause for concern, the simple way to deal with that is not to put the name of the defendant in the report in full. The victim's name is not mentioned. The case deserves publication. JW was tried in 2006. The Judge gave him IPP with a minimum term of 6 years less time served. The Judge, the counsel, the solicitors and the Court did not notice that JW's offence had been committed before 4 April 2005, so IPP could not be passed. He was no doubt erroneously advised that there was no appeal. In 2011 he had served the minimum term and there followed four reviews by the Parole Board. None of the people involved in reading the papers, which must have clearly stated the date of the offence, noticed that the sentence was unlawful. His lawyer then launched an appeal but it was not about the unlawfulness of IPP but about JW's lack of opportunity to undertake rehabilitation work and therefore his inability to be released or transferred to another prison. The Administrative Court adjourned the case pending a decision of the Supreme Court. After the Supreme Court had made its decision, the Court ordered fresh papers to be served and then for the first time someone noticed the date of the offence.

JW's lawyers then applied for a writ of habeas corpus because the order was unlawful. A sillier application is harder to imagine because all orders are treated as lawful until a court quashes them and the Administrative Court had no power to quash the IPP sentence. As was inevitable, his application was dismissed. On 30 January 2015 his lawyers at last made an application to the Court of Appeal and in February the Lord Chief Justice quashed the IPP sentence and so JW was released. The reason I tell you this sorry tale is because in 2006 barristers were generously paid. Further, the law about when IPP is available and which court a barrister should appeal to is so basic that no one can say that all those people who failed to spot the problems did so because of low pay.

You ask whether you are entitled to a proper service and indeed you are. The problem is that so many prisoners are not being given a proper service. You also ask who is going to do something about it. I fear the answer is no one. If a light plane crashes there is massive publicity and a report makes a whole list of recommendations. If JW stays in prison 3 years 3 months longer than he should, nothing happens. I wish I could be more optimistic.

Because this answer criticised the barrister for JW, I sent him a copy of it. He demands I correct the errors in my article and put forward points of law and facts which contradict the judgment of the Court. I have asked him to allow me to put his remarks in context by telling me when he was first instructed and who first noticed the significance of the date of the offence and when. No answer has been received. I will update you next month and if there is a point that can be made in his favour I will tell you.

Asking Robert and Jason questions

All letters should be sent to Inside Time, marked for Robert Banks or Jason Elliott. Letters are then sent by Inside Time to David Wells of Wells Burcombe, who forwards them to Robert and Jason.

Please make sure your question concerns sentence, prison law or release and not conviction. Prison law and release are dealt with by Jason Elliott (PO Box 847, North Shields, NE29 1FJ). Conviction enquiries should be sent to Inside Time and they will be answered by someone else. Unless you say you don't want your question and answer published in Inside Time, it will be assumed you have no objection to publication. It is usually not possible to determine whether a particular defendant has grounds of appeal without seeing all the paperwork. Analysing all the paperwork is not possible. The column is designed for simple questions and answers. Robert and Jason cannot in their answers in effect do the work that should be done by solicitors and barristers who have the relevant case papers.

No one will have their identity revealed. Letters which: a) are without an address, b) cannot be read, or c) are sent direct to Robert, cannot be answered. If your solicitor wants to see previous questions and answers, they are at www.banksr.com.